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The American Torts of Invasion of Privacy: Substantial Corruption of English Common Law

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After analysing more than 600 American tort cases, the late Dean William Prosser came to the conclusion that there were four distinct actions encompassed within the rubric 'invasion of privacy'.[1] Because these four actions are so different in nature and protect such disparate interests, American lawyers have had great difficulty in dealing conceptually with the torts of invasion of privacy.

And if it had not developed out of a law review article motivated in large part by the personal animus of the authors, Charles Warren and Louis D. Brandeis (later Justice Brandeis of the United States Supreme Court), against the 'yellow press' of that era,[2] the complex of the four torts of invasion of privacy would likely not be bedevilling American lawyers and journalists today.

The operation of these torts is so problematic that assessment of its value in a rational written constitutional legal system seems plainly in order as we approach a new century and millenium. In short, the question is posed whether the torts unleashed on our legal and communications system by Warren and Brandeis and embellished as a complex by Dean Prosser are worth the candle.

Intrusion

The least troublesome of the complex of privacy torts, from a communications media perspective, are intrusion into another's seclusion and appropriation of another's image or person for trade or commercial purposes. This may be explained by the fact that, narrowly viewed, these torts are not communicative in nature but simply protect property or financial interests; they are not aimed necessarily at the media. Indeed, one, intrusion, does not even require any publication for its commission. It is enough that the defendant invade without permission the plaintiff's legal protected zone of privacy, such as his home or his automobile. The other, appropriation, while often implicating advertising media, does not necessarily require mass communication for its perpetration. For example, the use of photographs of non-consenting subjects in a photographer's window would suffice.

This is not to say that media personnel will not, on occasion, commit these torts in the course of communicating to the public. It is not unheard of for investigative reporters to invade a newsworthy subject's protected zone of privacy to obtain a story[3] or for the entertainment[4] or advertising[5] media to borrow, without permission or compensation, someone's image or identity for commercial gain. But these torts are designed to protect the individual's property interests and celebrity market-value from invasion or misappropriation by *anyone*. Because the communication media and their publication process are not targeted by these particular torts, the potential for conflict with interests protected by the First Amendment to the United States Constitution is minimal and a constitutional problem concerning the continued existence and operation of these torts is generally avoided.

That is all to the good because the interests involved with the intrusion and appropriation torts are fairly well defined, substantial and deserve protection in contemporary society.

Intrusion represents little more than the extension of the ancient torts of trespass to real property and chattels in order to cover invasions of private spaces such as homes, offices and automobiles through the employment of photographic and electronic devices not requiring apparent physical incursion. If the intrusive tort did not already exist it would have to be invented for a society obsessed with snooping and with facilitating devices capable of capturing and recording even the slightest movements and faintest whispers at considerable distances and behind even solid barriers.

One of the inherent needs of human beings which must be met if they are to retain their individuality and dignity are zones of physical space to which they can truly retreat from the world. This need becomes more acute every day the population continues to increase. Legal protection for those physical zones of privacy is thus of paramount importance in a rational democratic society, and the tort of intrusion should only strengthen in the 21st century because of its noble purpose.

Appropriation

The appropriation tort is one realistically protecting whatever property value there may be in one's very being such as the distinctive singing voice and musical style, for instance, of a

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1 See Prosser, 'Privacy', (1960) 48 California L. Rev. at 383.
2 See Warren and Brandeis, 'The Right to Privacy', (1890) 4 Harvard L. Rev. at 193.
3 See for example *Dietemann v Time, Inc.* 449 F.2d 245 (9th Cir. 1971).
4 See for example *Groucho Marx Prods, Inc. v Day and Night Co., Inc.* 689 F.2d 317 (2d Cir. 1982) (appropriation not actionable because right of publicity not descendible under facts of case).
5 See for example *Midler v Ford Motor Co.* 849 F.2d 460 (9th Cir. 1988).

Bette Midler.[6] Thus far this tort appears to be working reasonably well to prevent others from taking a person's celebrity against his will. The main problem here, given the tort's incorporation in statutes in a number of jurisdictions, most notably the celebrity-studded states of California,[7] New York[8] and Tennessee,[9] is the scope of protection provided by such statutes. But this is merely a problem of statutory construction and does not go to the operation of the tort when applicable.

Fundamental justice would seem to dictate that the civil law permit one whose identity has commercial value to control the commerce in his identity. The law should protect such individuals so they may decide for themselves whether to defend their privacy by withholding their celebrity from commerce or to waive privacy by making such celebrity available for a price. So long as protection is limited to purely commercial trading in human identity, there can be little objection to a tort that secures control of that commerce to the person whose identity is involved. While the privacy interest involved here is mainly financial and perhaps not as compelling as that protected by the intrusion tort, it too furthers individual autonomy and personhood and we may expect the appropriation tort to continue to be recognised in the United States in the 21st century. On the other hand, the false light and publicity of private facts torts born as corruptions of English common law, poorly rationalised, problematic in operation and aimed at communication of news and information seem poor candidates for long-term survival.

False Light

False light involves the giving of publicity concerning another which portrays the other before the public in a false light with knowledge or reckless disregard by the communicator of the falsity of the publicised matter and such false portrayal is highly offensive to a reasonable person.[10] According to Dean Prosser[11] the false light tort got its start in 1816 when Lord Byron succeeded in enjoining the advertising for sale of inferior poems falsely attributed to the great poet.[12] This was not a tort case but what might be characterised today as an action for unfair competition. The modern reported cases recognising false light do not attempt to rationalise the value of the tort. Rather, they often rely on the American Law Institute's *Restatement (Second codification)* of Prosser's classification system to justify its existence.[13]

Prosser himself failed to rationalise the need for such tort apart from defamation when he stated: 'The interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation.'[14] He might have been influenced by Dean John Wigmore's early 20th century article which he cited,[15] calling for the recognition of an actionable right of privacy to protect against certain classes of false statements whether or not falling within the accepted definition of defamation.[16] In support, Wigmore, the American grandmaster of the law of evidence, could cite only a handful of cases not involving defamation actions.[17] Of these, not one sounded in tort. They were all actions in equity for injunctions and, with but one exception, *Lord Byron's* case, in which writs were issued without explanation, injunctive relief was granted because of the financial liability which might attach from being falsely linked to a business enterprise or even to the birth of a child.[18] This is a far cry from supporting a tort right of privacy protecting a *personal* interest in freedom from being falsely portrayed to the public.

Interestingly, Wigmore, in formulating this new tort, reveals the same bias against the press of his day as that exhibited by Warren and Brandeis in theirs[19] when he stated in his article:

> Finally there is the common situation in which the defendant falsely attributes to the plaintiff the possession of some opinion.... [I]t is a not uncommon form of injury in current journalistic practice. The irresponsible vendors in sensations, moved by the meanest motives of mankind, will recklessly attribute to this or that personage some view on current affairs which is alien to his actual thoughts and is calculated to make hard feelings that never can be assuaged by protestation.[20]

And like Warren and Brandeis he did not consider the impact of his proposed tort on the press clause of the First Amendment. Presumably he would have championed injunctions to prevent the dissemination of false statements by the press, given his citation almost exclusively to cases in equity granting the writ.

The appellate cases cited by Prosser[21] do support his recognition of the false light category,[22] but they merely recognise such tort action arising out of some general right of privacy or the even more general right to be let alone. They do not explain why the tort is needed, the interest or interests protected, how it can be harmonised with defamation and how it might be harmonised with the protections accorded freedom of expression.[23]

Thus, the underpinnings of this 20th-century tort are shaky, but with the publication of Prosser's article in the

6 *Ibid.*
7 See Cal. Civ. Code sections 990 (deceased persons), 3344 (living persons) (West 1988 Supp.).
8 See NY Civ. Rights Law §§ 50, 51 (McKinney 1976).
9 See Tenn. Code Ann. §§ 47-25-1101-1108 (1984).
10 See *Restatement of Torts (Second)* § 652E (1977).
11 Prosser, above, Note, 1, at 383, 398.
12 *Lord Byron v Johnston*, (1816) 2 Mer 29, [1816] 35 All ER 851.
13 Compare Prosser, above, Note 1, at 383 with *Restatement of Torts (Second)* §§ 652A–E (1977).
14 Prosser, above, Note 1, at 400.
15 *Ibid.* at 398 Note 129.
16 Wigmore, 'The Right against False Attribution of Belief or Utterance', (1916) 4 Ky L. J. (No. 8) at 3.
17 *Vassar College v Loose–Wiles Biscuit Co.* 197 Fed. 982 (D. Mo. 1912), *Edison v Edison Polyform & Mfg. Co.* 73 NJ Eq. 136, 67 A. 392 (1907); *Vanderbilt v Mitchell* 72 NJ L. 927, 67 A. 103 (1907); *Walter v Ashton* [1902] 2 Ch. 282; *Dixon v Holden* LR 7 Eq. 488 (1869); *Routh v Webster* 10 Beav. 561, [1847] 50 All ER 698.
18 See *Vanderbilt v Mitchell*, above, Note 17 (false statement as to paternity on a birth certificate).
19 See text accompanying Note 36, below.
20 Wigmore, above, Note 16, at 7. Apparently Wigmore too was 'burned' by a journalist of the time who allegedly misquoted the great scholar to his considerable embarrassment. *Ibid.* at 8.
21 Prosser, above, Note 1, at 383, 398 to 400 Notes 131 to 134, 146.
22 See Hill, 'Defamation and Privacy under the First Amendment', (1976) 76 Columbia L. Rev. at 1205, 1270.
23 Many of the questions associated with recognition of false light are explored in *Sullivan v Pulitzer Broadcasting Co.* 709 SW 2d 475 (Mo. 1986) (*en banc*) in which the Missouri Supreme Court refused to decide whether to recognise the tort because the action before it also sounded in traditional defamation. See also *Prescott v Bay St Louis Newspapers, Inc.* 497 So. 2d 77, 80 (Miss. 1986).

California Law Review the tort came to be accepted almost unquestioningly by the courts as an aspect of the common law right of privacy.[24]

Despite the lack of clear definition of the interest supposedly served, the *prima facie* case of false light is straightforward[25] enough. False statements of fact can be exposed as such by establishing the true facts. The effect of publicity of false statements in placing the plaintiff in a false light in the eyes of the public can be established by testimony of members of the public regarding the view they had of the plaintiff following their exposure to the false statement or statements. The finder of fact is then in a position to determine whether the false light would be highly offensive to a reasonable person in the plaintiff's position. Finally, while the burden is great, the issue of whether the defendant publicised the false statement with knowledge of its falsity or with reckless disregard as to its falsity is merely one of providing the difficult element of actual or constitutional malice required by the United States Supreme Court when communicative tort actions are directed against media defendants.

The serious problem arises not from the elements of the *prima facie* case but from the very nature of the tort as going beyond defamation. This problem threatens the tort's very existence. While all actionable defamatory statements place the victim in a false light in the eyes of those who receive and accept such communications, the tort also encompasses false non-defamatory statements, thereby increasing the chill on free expression.

This chill can be substantial given the hierarchical nature of the news and information media. News and information is normally gathered by reporters and researchers and then presented to editors for processing and the decision whether to publish. Because defamatory material is that which injures reputation, such material usually provides a red warning flag to the editors of legal danger which can be countered by careful verification of the questionable material or its modification or excision. But false statements neutral or even laudatory regarding a subject's reputation or status provide no such warning to editors. They are thus unable to protect themselves and their publishers from liability except at the expense of laboriously checking the accuracy of *all* statements of fact about individuals presented to them by the reporters and researchers. There are thus two alternatives confronting editors because of the false light tort: either risk liability by not double checking *every* asserted fact about individuals or avoid such liability at great cost in time and money. Under either alternative the American news and information media are burdened.

The media must accept the burden on free expression of potential civil liability for defamation because such liability was sanctioned by the common law of England adopted by the American Colonies at the time of the Declaration of Independence and before the Bill of Rights. This, of course, is not true of invasion of privacy generally or false light specifically. Thus the imposition of civil liability for publicising false non-defamatory statements gives rise to potential conflicts with the First Amendment not presented by libel and slander. The requirement imposed on plaintiffs to establish actual or Constitutional malice on the part of those creating false light[26] does not fully eliminate the risk of this conflict.

The tension between false light and First Amendment protection for the media was noted in the recent case of *Renwick v News and Observer Publishing Co.*[27] There, the plaintiff, an associate dean at the University of North Carolina brought suit for libel and false light against two North Carolina newspapers which had published editorial comments about apparent bullying of the University by the United States Government regarding minority admissions. The newspaper pieces indicated that Washington's ire was raised by allegations made by Dean Renwick, who was formerly in charge of minority admissions at the school, that 'between 1975 and 1978 about 800 black students had been denied admission'. Renwick's actions against the newspaper company were based on claimed falsity of the reported *number* of black students who had been denied admission. Amplifying on his contention Renwick stated in his complaint that the error in the opinion pieces gave 'the impression that plaintiff is an extremist, a liar and is irresponsible in his profession'.[28] The two claims were dismissed by the trial court but reinstated by the North Carolina Court of Appeals.

The North Carolina Supreme Court in turn reversed the decision of the intermediate appellate court. Regarding the action for libel *per se*, the high court found that the most obvious and natural meaning to be accorded the erroneous statement of fact incorporated by the defendant newspapers in their editorial commentaries was that it did not tend to defame the plaintiff. Turning from defamation to the false light claim, the court indicated two concerns with the tort. First, the right to recover often overlaps actions for libel and slander. Judicial efficiency would not be served by recognising an essentially duplicative tort action.

Of greater concern was the First Amendment issue. The court thought that its recognition of false light would increase the tension already existing between the First Amendment and tort law because it would allow recovery for non-defamatory false statements. The court believed that it would be creating 'a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, *particularly as related to nondefamatory matter*'[29] *(emphasis the court's)*.

Renwick is significant because it is the first appellate decision wholly and *specifically* rejecting the false light tort and doing so in part because of its redundant nature in substantially overlapping libel and slander and in part because the non-overlapping portion of the tort raises the spectre of conflict with the First Amendment. While such conflict is somewhat remote, the North Carolina Court may be recognising that the unrefined interest in protecting individuals from embarrassment and emotional upset arising out of publicity of false non-defamatory statements about them is not substantial enough to justify running the risk of First Amendment violations.

24 See for example *Cantrell v Forest City Pub. Co.* 419 US 245, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974), *Time, Inc. v Hill* 385 US 374, 87 S. Ct 534, 17 L. Ed. 2d 456 (1967).
25 See *Restatement of Torts (Second)* § 652E (1977).
26 See *Time, Inc. v Hill*, above, Note 24.
27 310 NC 312, 312 SE 2d 405 (1984).
28 *Ibid.* at 319, 312 SE 2d at 409.
29 *Ibid.* at 325, 312 SE 2d at 413.

Now that one respected high state court has, with persuasive reasoning, rejected false light by name, it may be that jurisdictions which have previously accepted the tort uncritically following Prosser's enunciation of it will reappraise it, balancing the individual interest in freedom from embarrassment and mental upset against the societal interest in freedom of expression. If such a balance is struck, the false light tort may well disappear in the coming century.

Publicity of Private Facts

If the conception and operation of false light is doubtful, the tort of unreasonable publicity of private embarrassing facts seems downright ill-conceived within the framework of the common law. Warren and Brandeis in their seminal article on privacy in the *Harvard Law Review*[30] chose *sui generis* or inapposite English precedents to support their notion that common law tort protection existed against unreasonable and widespread publicity of one's true but embarrassing private facts. By their article they instigated American common law development of the tort[31] but without giving serious consideration to the substantiality of the interest to be protected or the dangers posed to freedom of expression by imposing civil liability for dissemination of truthful information.[32] These oversights are mitigated by the requirement that the private facts publicised not be of legitimate concern to the public.[33] Thus, only if media disclosures of private facts are not deemed 'newsworthy' may civil liability be imposed. But such mitigation is only partial because the concept of newsworthiness is complex[34] and its invocation by the media in any given case subject to debate.[35]

That Warren and Brandeis failed to come to grips with the interest their proposed tort would protect or the dangers it would pose is not surprising given the motivation for their article. Their obvious concern was for putting down the popular press of the time when they say in sweeping terms, 'The press is overstepping in every direction the obvious bounds of propriety and decency.'[36] They did refer to the harm of 'mental pain and distress, far greater than could be inflicted by mere bodily injury'[37] stemming from true but embarrassing publicity. But the authors did not consider that such real pain and distress endured by complaining parties is the result of having their true and more complete personas exposed to public view. While no doubt persons embarrassed by publicity would prefer 'to be let alone', their interest in presenting a false or incomplete image to others is not one that seems very compelling.

The argument is further made that the tort protects societal interest in maintaining social standards and a proper moral climate.[38] The authors might also have mentioned the societal interest in rehabilitation of criminals,[39] the encouragement of public testimony[40] and the protection of witnesses from physical harm.[41] But common law tort is designed to protect the interests of individuals and, more recently in the United States, classes of individuals. It is not designed to protect society generally. That is best left to legislative action.

In short, the interest protected by Warren and Brandeis's tort is insubstantial,[42] which may explain why there have been few successful actions and why contemporary courts are narrowing their view of what facts are private and embarrassing and, at the same time, broadening their view of the newsworthiness privilege.[43]

Aside from raising serious doubt as to the need for this tort, the insubstantiality of the interest protected has serious constitutional ramifications. When truthful publicity is made the basis for civil liability there can be little doubt as to the chilling effect on free expression. Even in the absence of a broad absolutist view of the protection afforded expression by the First Amendment, the narrower *ad hoc* balancing approach currently in vogue in the United States Supreme Court requires some very substantial state interest outweighing free expression before First Amendment

30 Warren and Brandeis, above, Note 2.

31 Their central authority for the existence of the tort, *Prince Albert v Strange* 2 De Gex & Am. 652, [V.C. 1848] 64 All ER 293, concerned the threatened reproduction and summary description of certain etchings made by Queen Victoria and Prince Albert for their own amusement. Going beyond common law protection of intellectual property as the court had to do because a mere summary description of the etchings would not have qualified as an invasion of any property interest, Vice-Chancellor Knight Bruce said that the courts in proper cases would prevent injurious disclosures as to private matters. It apparently did not occur to Warren and Brandeis that this was a one of a kind case favouring the nominal ruler of the court handing down the decision. The other cases cited by them deal with breaches of trust or contract. See *Abernathy v Hutchinson* 1 H & Tw. 33, 3 LJ 209, [1825] 47 All ER 1313; *Tuck v Priester* (1887) 19 QBD 629; *Pollard v Photographic Co.* (1888) 40 Ch.D. 345, cited in Warren and Brandeis, above, Note 2, at 193, 207 to 210.

32 In fairness to the authors, it must be noted that at the time they wrote their article the Supreme Court had not clearly adopted the theory of incorporation applying portions of the Bill of Rights to the states through the Fourteenth Amendment. See J. Nowak, R. Rotunda and J. Young, *Constitutional Law*, West Publishing Co., 1986 (3rd ed.), at 361 to 364. It was not until 1925 that the Court applied the speech clause of the First Amendment to the states in *Gitlow v New York* 268 US 652, 666, 45 S. Ct 625, 630, 69 L. Ed. 1138, 1146 (1925) and not until 1931 that it so applied the press clause in *Near v Minnesota* 283 US 697, 701, 51 S. Ct 625, 633, 75 L. Ed. 1357, 1363 (1931).

33 See *Restatement of Torts (Second)* § 652D (1977).

34 See Bezanson, 'Public Disclosures as News: Injunctive Relief and Newsworthiness in Private Actions Involving the Press', (1979) 64 Iowa L. Rev. at 1061, 1066 to 1069.

35 Compare for example *Daily Times Democrat v Graham* 276 Ala. 380, 162 So. 2d 474 (1964) with *Cape Publications, Inc. v Bridges* 423 So. 2d 426 (Fla. App. 1982), cert. denied 464 US 893, 104 S. Ct. 239, 78 L. Ed. 2d 229 (1983); and *Sipple v Chronicle Pub. Co.* 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984) with *Diaz v Oakland Tribune, Inc.* 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983).

36 Warren and Brandeis, above, Note 2, at 193, 196.

37 *Ibid.*

38 *Ibid.*

39 See *Briscoe v Reader's Digest Assoc.* 4 Cal. 3d 529, 542, 93 Cal. Rptr. 866, 875, 483 P. 2d 34, 43 (1971); *Melvin v Reid* 112 Cal. App. 285, 297 P. 91, 93 (1931).

40 See *Capra v Thoroughbred Racing Assoc.* 787 F. 2d 463, 465 (9th Cir.), cert. denied 479 US 1017, 107 S. Ct 669, 93 L. Ed. 2d 721 (1986).

41 *Ibid.*; *Times Mirror Co. v Superior Court* 198 Cal. App. 3d 1420, 1426, 244 Cal. Rptr. 556, 563 to 564 (1988).

42 See Epstein, 'Privacy, Property Rights, and Misrepresentations', (1978) 12 Georgia L. Rev. at 455, 463 ('Privacy, however lofty its pedigree is the least important tort for a civilized society.'); Kalven, 'Privacy in Tort Law—Were Warren and Brandeis Wrong?', (1966) 31 Law and Contemp. Probs. at 327, 328 (the author calls Warren and Brandeis's tort 'petty'); Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort', (1983) 68 Cornell L. Rev. at 291, 323 to 324.

43 See for example *Virgil v Sports Illustrated* 424 F. Supp. 1286 (SD Cal. 1976); see also Kalven, above, Note 42, at 327, 336.

protection is subordinated.[44] Thus, the vagueness and inconsequentiality of the countervailing interest vindicated by state recognition and enforcement of the private facts tort makes it vulnerable to attack on constitutional grounds whatever First Amendment theory is employed.[45]

This tort is also problematic on a less philosophical level. One would think that after a hundred years acquaintance with the tort, American courts would be in agreement at least as to the elements of the *prima facie* case. Yet there is still uncertainty whether some kind of showing of fault analogous to actual malice in defamation law[46] must be made by plaintiff in order to insure protection for truthful communications.[47] And if *scienter* must accompany the publicity, no one is yet sure exactly what the state of mind of the defendant must be.

The conceptual and practical difficulties with the Warren and Brandeis tort have recently moved two jurisdictions to limit substantially its reach or to reject it entirely. In *Anderson v Fisher Broadcasting Co.*[48] a television cameraman for the defendant broadcasting company photographed the scene of the plaintiff's automobile accident. Plaintiff was recognisable on the videotape and was shown bleeding and in pain while receiving emergency medical treatment. The tape was not used on any regular news programme but some time later a brief excerpt showing the plaintiff was used without the plaintiff's consent in promotional spot advertising of a special news report to be aired about a new system for dispatching emergency medical help. Plaintiff sued for general damages for mental anguish occasioned, *inter alia*, by the publicising of his image in an injured condition. No allegation was made that the publicity was motivated by any desire to cause severe mental or emotional distress to the plaintiff. The trial court rendered summary judgment for the broadcaster, holding that the tape was newsworthy, that it remained so despite not being promptly aired and that it did not lose its newsworthy character when used to advertise another newsworthy broadcast. The Oregon Court of Appeals reversed the summary judgment because it believed that there was an issue of fact as to whether the tape was newsworthy when used to promote another programme not involving the plaintiff.

In reversing the intermediate court and reinstating the summary judgment, the Oregon Supreme Court confronted the question whether truthfully publicising allegedly private facts about an individual which he would have preferred to keep private is, without more, a tort. The court answered the question in the negative. It held that to be actionable the complaint of conduct on the part of the media must be designed to cause severe mental or emotional distress, whether for its own sake or as a means to some other end, and it must qualify as such extraordinary conduct that the finder of fact could determine that it went beyond the farthest reaches of socially tolerable behaviour.[49] In other words, the invasion of privacy to be actionable would have to amount to the modern tort of intentional infliction of severe emotional distress, or 'outrage'.[50] Thus, the communicative tort of publicity of private facts has been transformed into a mental and emotional assault tort in Oregon.

Going beyond the Oregon Supreme Court, the North Carolina Supreme Court in *Hall v Post*[51] refused to recognise any aspect of the publicity of private facts tort. In *Hall*, the *Salisbury Post* published two articles dealing with the search by a woman and her second husband for the baby girl that she had abandoned 17 years before. The first article related to the details of her unsuccessful search and then asked for the public's help in locating the daughter. Shortly after the article was published, the couple was called and informed of the child's identity and whereabouts. The second article accurately reported the successful conclusion of the search, the identity of the child and her adoptive mother, the details of a telephone encounter between the natural mother and the adoptive mother, and the emotions exhibited by the parties. Plaintiff, adoptive mother and daughter, sued the reporter and the publisher for invasion of privacy, alleging that they had to flee their home in order to avoid public attention resulting from the articles and that they had to seek and receive psychiatric care for emotional and mental distress caused by the publicity. The trial court granted summary judgment for the defendants. The Court of Appeal's reversal of the summary judgment was, in turn, reversed by the North Carolina Supreme Court. That court's rejection of Warren and Brandeis's tort was predicated on the substantial overlap with the 'outrage' tort that was already recognised in North Carolina[52] and, perhaps more importantly, the constitutionally suspect nature of the tort. Regarding the First Amendment issue the court said: '[I]t would be entirely unrealistic to suggest that adoption of the private facts would do other than add to the tension already existing between the First Amendment and the law of torts.'[53] That tension is, of course, created by the imposition of civil liability for the communication of truthful information.[54]

44 For discussion of the absolutist and *ad hoc* balancing approaches to the Bill of Rights, particularly with regard to the First Amendment, see J. Nowak, R. Rotunda and J. Young, above, Note 32, at 837 to 839; L. Tribe, *American Constitutional Law*, Foundation Press, 1988 (2nd ed.), at 791 to 794; H. Zuckman, M Gaynes, T. Carter and J. Dee, *Mass Communications Law*, West Publishing Co., 1988 (3rd ed.), at 9 to 12, 16 to 19.

45 This vulnerability has been noted by Professor Zimmerman:

> [A] state can justify a content-based regulation of speech, such as the private-facts tort, only if it can demonstrate a clearly defined harm and a compelling interest in its prevention. But the nature of the harm done by publication of private facts has continued for almost a century to elude more than vague, subjective definition.

Zimmerman, above, Note 42, at 291, 341.

46 See *New York Times Co. v Sullivan* 376 US 254, 84 S. Ct 710, 11 L. Ed. 2d 686 (1964).

47 Compare *Hawkins by Hawkins v Multimedia, Inc.* 288 SC 569, 344 SE 2d 145 (1986), cert. denied 479 US 1012, 107 S. Ct 658, 93 L. Ed. 2d 712 (1986), with *Anderson v Fisher Broadcasting Co.* 300 Or. 452, 712 P. 2d 803 (1986). But see *Florida Star v B. J. F.* 109 S. Ct 2603, 105 L. Ed. 2d 443 (1989) in which the Supreme Court seems to assume the need for some kind of *scienter* to accompany the publicity of private facts. Other concerns about the tort on an operational level are expressed by Justice Linde in *Anderson*. *Ibid.* at 457, 712 P. 2d 803, 809. See also Kalven, above, Note 42, at 326, 331, 333 to 336.

48 Above, Note 47.

49 *Ibid.*, at 455, 712, P. 2d at 807.

50 For a discussion of this tort see *Wilkinson v Downton* [1897] 2 QB 57; *Restatement of Torts (Second)* § 46 (1977); W. Prosser and W. Keeton, *Torts*, West Publishing Co., 1984 (5th ed.), at 55 to 66.

51 323 NC 259, 372 SE 2d 711 (1988).

52 372 SE 2d at 717.

53 *Ibid.*

54 See Zimmerman, above, Note 42, at 291, 341.

The *Anderson* and *Hall* cases are thus far unique[55] but they pinpoint very questionable aspects of the private facts tort and may presage a broader challenge leading to its demise in the second century of its existence. Indeed, at least three justices of the United States Supreme Court think that the demise may have already occurred.

In *Florida Star v B. J. F.*,[56] a rape victim reported the assault and accompanying robbery to the local sheriff's department. The department prepared a report of the incident identifying the victim by name. The report was placed in the department's press-room where the defendant newspaper's reporter-trainee copied it verbatim. A reporter then prepared a short item for the paper's 'Police Reports' section naming the sex offence victim in violation of the paper's own policy. The identification got past the responsible editor and found its way into print. The victim sued the publisher and the sheriff's department for negligently violating a Florida criminal statute making it a misdemeanor for anyone to publicise in any medium of mass communication the name or address or other identifying fact or information about sex offence victims. After a trial at which the publisher raised the First Amendment as a defence, the court directed a verdict of liability for the plaintiff. The jury then awarded the plaintiff substantial compensatory and punitive damages. The Florida District Court of Appeals affirmed the judgment in a short *per curiam* opinion virtually ignoring the First Amendment issue. The Florida Supreme Court denied review. On appeal, the Supreme Court reversed, holding that where a newspaper publishes truthful information which it has lawfully obtained, criminal punishment or civil liability may only be imposed when narrowly tailored to further a state interest of the highest order. Here, the majority concluded that the Florida statute seized upon by the plaintiff to establish the newspaper's negligence *per se* was for three reasons not properly tailored to further such an interest. First, the state itself through a state agency made the information available to the media thereby suggesting that less constitutionally intrusive means were available to prevent the publicity. Secondly, the statute involved permitted automatic tort liability for its violation on a negligence *per se* theory, stripping away the need, in a purely common law privacy action, to establish that the disclosure was highly offensive to a reasonable person and that it was accompanied by some kind of *scienter*. Finally, the statute involved was under-inclusive in that it permitted criminal punishment or civil liability for the dissemination of a rape victim's identity only through an 'instrument of mass communication', thereby permitting such dissemination by neighbourhood gossips.

In a dissent joined in by Chief Justice Rehnquist and Justice O'Connor,[57] Justice White repeated the idea first expressed by Warren and Brandeis that some private facts should be protected from disclosure by the media and indicated that the identification of a rape victim was the quintessential private fact. 'If the First Amendment prohibits wholly private persons (such as B. J. F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any "private facts" which persons may assume will not be published in the newspapers, or broadcast on television.'[58] Justice White, perhaps more in sorrow than in anger, plainly stated his belief that the decision in *Florida Star* destroyed the publicity of private facts tort.

> By holding that only 'a state's interest of the highest order' permits the state to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the court accepts appellant's invitation... to obliterate one of the most note-worthy legal inventions of the 20th-century: the tort of publication of private facts....[59]

Justice White failed, however, to note that this tort arose either out of an innocent or intentional misreading of English common law by Warren and Brandeis and that Great Britain has done very nicely without such a tort in this same 20th century.[60]

The news, information, and entertainment media in the United States have been saddled with this nuisance of a communicative tort for altogether too long. Hopefully, they will not continue to be so burdened in the 21st century.

55 The only other case which could be found even approaching them is *Brunson v Ranks Army Store* 161 Neb. 519, 73 NW 2d 803 (1955) in which the Nebraska Supreme Court rejected the entire idea of common law invasion of privacy in the context of publicity of private embarrassing facts spread by a non-media defendant.

56 109 S. Ct 2603, 105 L. Ed. 2d 443 (1989).

57 *Ibid.* at 2614, 105 L. Ed. 2d at 461.

58 *Ibid.* at 2618, 105 L. Ed. 2d. at 466.

59 *Ibid.*

60 To this day no tort of invasion of privacy exists in Great Britain. See *Anderson v Fisher Broadcasting Co.*, above, Note 47, at 452, 457, 712 P. 2d 803, 808 to 809; *Report of the Committee on Privacy*, 1972 (Cmd 5, No. 5012); Zimmerman, above, Note 42, at 291, 342 Note 268.

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